90-754

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

THE FARM CREDIT BANK OF WICHITA, CHERYL CLASS-ERICKSON, RODNEY CLASS-ERICKSON AND KATHERINE WUNDERLICH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether there is an implied private right of action under the right to first refusal provision of the Agricultural Credit Act of 1987. That provision requires Farm Credit System (FCS) institutions to afford farmers subject to foreclosure or voluntary conveyance in lieu of foreclosure an opportunity to repurchase their property from an FCS institution at or below market value before their farms are resold to a third party. 12 U.S.C. Section 2219a.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Petition	4
Conclusion	10

TABLE OF AUTHORITIES

Pages

CASES

Cort v. Ash, 422 U.S. 66 (1975) 8

Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), *cert. den.*, 110 S.Ct. 867 (1990) 5

Griffin v. Federal Land Bank of Wichita, 902 F.2d 22 (10th Cir. 1990) 5

Leckband v. Naylor, 715 F.Supp. 1451, (D.Minn. 1988), *app. dismissed*, No. 88-5301 (8th Cir. June 8, 1989) 9, 10

Middlesex County Sewage Authority v. National Sea Clammers Association, 453 U.S. 1,20 (1981) 9

Payne v. Federal Land Bank of Columbia, No. 89-1028 (4th Cir., October 16, 1990) 6, 10

Thompson v. Thompson, 484 U.S. 174 (1988) 6, 7

Wright v. City of Roanoke Redevelopment Authority, 479 U.S. 418 (1987) 9

Zajac v. Federal Land Bank of St. Paul, 887 F.2d 844 (8th Cir. 1989) 6, 7, 8, 9, 10

Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990) 6

STATUTES AND REGULATIONS

Agricultural Credit Act of 1987, Pub. L. No. 100-233 ..... *passim*

12 U.S.C. Section 2219a 2, 4

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1291 2

28 U.S.C. Section 1331 2

TABLE OF AUTHORITIES – Continued

Pages

MISCELLANEOUS

H.R. No. 100-490, 100th Cong., 1st Sess., p. 178 3

H.R. Rep. No. 295 (I), 100th Cong., 1st Sess., p. 52 5

H.R. 3030, 100th Cong., 1st Sess..... 7

Sen. Rep. 100-230, 100th Cong., 1st Sess.....7, 8

133 Cong. Rec. 11750 (August 7, 1987) 7

133 Cong. Rec. 16956 (November 2, 1987) 3

133 Cong. Rec. 16993, 16995 (December 2, 1987)..... 7

133 Cong. Rec. 11809, 11873 (December 18, 1987) 5

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CALVIN J. PERKINS,

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THE FARM CREDIT BANK OF WICHITA, CHERYL CLASS-ERICKSON, RODNEY CLASS-ERICKSON AND KATHERINE WUNDERLICH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Calvin J. Perkins respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-titled proceeding on August 17, 1990.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought is attached as Appendix A (App. A, p. 1a). That ruling held that there is no private right of action under

12 U.S.C. Section 2219a. That ruling summarily affirmed the ruling of the district court granting summary judgment to the Respondents on the ground that there is no private right of action to enforce 12 U.S.C. Section 2219a. The district court's opinion is attached as Appendix B. (App. B, p. 4a).

JURISDICTION

The opinion of the court of appeals was entered on August 17, 1990. No petitions for rehearing were filed in the court of appeals. The court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Appendix C, p. 11a, sets out the pertinent provision of the Agricultural Credit Act of 1987, P.L. No. 100-233, 12 U.S.C. Section 2219a.

STATEMENT OF THE CASE

Jurisdiction Below

Jurisdiction in the district court was invoked under 28 U.S.C. Section 1331. Jurisdiction in the court of appeals was invoked under 28 U.S.C. Section 1291.

The Agricultural Credit Act of 1987

The Agricultural Credit Act of 1987, Pub. L. No. 100-233 (the Act) constituted a comprehensive and

detailed overhaul of the loan servicing requirements of the federally created and chartered Farm Credit System (FCS). The Act also authorized an infusion of up to $4 billion into the FCS to buoy up its cooperatively owned lending institutions and to prevent further losses to the farmer-shareholders who own those institutions. In all, the Act represents the most complete and intrusive congressional intervention into agricultural credit since the Great Depression.

Title I of the Act, "Assistance to Farm Credit System Borrowers," contains numerous mandatory loan servicing procedures which must be followed by FCS institutions. Because of Congressional judgment that one purpose of the Act was to keep family farmers on the farm[1] and to provide family farmers with homestead protection,[2] Congress included the right of first refusal in the Act.

Mr. Perkins' Situation

Calvin J. Perkins is a Colorado farmer and rancher. He owned approximately 9,200 acres of agricultural land in Archuleta County, Colorado. On March 28, 1989, the Farm Credit Bank of Wichita (FCB), an FCS institution, acquired certificates of purchase to nine parcels of Mr. Perkins' land, plus the water rights, at a sheriff's sale held pursuant to a state court foreclosure action initiated by FCB.

---

[1] Statement of Senator Pryor, 133 Cong. Rec. 16956 (November 2, 1987).

[2] H.R. No. 100-490, 100th Cong., 1st Sess., p. 178.

On April 17, 1989, FCB conveyed its interest in Parcel IV of Mr. Perkins' land to the Class-Ericksons for $28,415.81. On May 9, 1989, FCB conveyed its interest in Parcel IX, plus the water rights, to Ms. Wunderlich for $108,766.99 and $25,412.88 respectively. It is undisputed that FCB did not offer Mr. Perkins a right of first refusal prior to these conveyances. Mr. Perkins therefore lost the opportunity to repurchase his land at a market price as opposed to having to redeem it for the full amount of the debt.

Parcel IX was the key parcel to Mr. Perkins' ranching operation. It was the headquarters of that operation, was in adjacent proximity to two-thirds of his property, and was used as access to the remaining property. Mr. Perkins submitted an affidavit to the district court from his son-in-law, Dr. Murray K. Jacobs, stating that Dr. Jacobs would have been seriously interested in financing Mr. Perkins' requisition of these parcels had Mr. Perkins been offered his right of first refusal as required by the Act.

REASONS FOR GRANTING THE PETITION

The question of whether 12 U.S.C. Section 2219a creates an implied private right of action is an important question of federal law which has not been, but should be, settled by this court. The Farm Credit System is owned by its 600,000 borrower-shareholders. FCS lenders extend approximately 30 percent of all agricultural credit in the nation, with a current total of over $50 billion. Congress underscored the importance of the FCS with its

comprehensive overhaul of the system contained in the 1987 Act, and its infusion of $4 billion into the system.

The Agricultural Credit Act was passed at a time of grave financial difficulty for the FCS as a whole, and a time of grave financial crisis for tens of thousands of its borrowers. As the legislative history to the House version of the Act, H.R. 3030, indicates:

> Complaints about the rights of system borrowers being abused at both the association and district levels have been like a constant drumbeat in the offices of some members of Congress for several years.

H.R. Rep. No. 295 (I), 100th Cong., 1st Sess., p. 52. H.R. 3030 was reported to the floor of the House with the statement:

> In summary, I want to let the system and FCA know that together they destroyed the integrity of the 1985 Farm Credit Act and necessitated this year's legislation. The Congress cannot tolerate such irresponsible action again and we expect the system and its regulator to diligently undertake their respective responsibilities and to cooperate in those matters that are necessary to ensure that full advantage is taken of the new provisions of the law.

133 Cong. Rec. H 11809, H 11873 (Dec. 18, 1987).

Furthermore, there now appears to be a split in the circuits as to whether there is a private right to enforce the Act. The Ninth Circuit, in *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. den.*, 110 S.Ct. 867 (1990), and the Tenth Circuit in *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990) held that there is no such right. A panel of the Eighth Circuit held

that such a right does exist. *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989). The panel opinion in *Zajac* was reconsidered *en banc*, and the *en banc* opinion of the Eighth Circuit held that there was no such right. However, four judges of the Eighth Circuit disagreed with the majority opinion, concluding that there is a private right to enforce the Act. *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990). A split in the circuits was again created when the Fourth Circuit recently recognized a farmer-borrower's right to enforce the right of first refusal against a farm credit system institution in *Payne v. Federal Land Bank of Columbia*, No. 89-1028 (4th Cir., October 16, 1990) (App. D. p. 16a). While the *Payne* opinion does not explicitly discuss the question of whether there is a private right to enforce the right of first refusal, its discussion of the merits of the farmer's claims and reversal of the district court's dismissal of the case for failure to state a claim upon which relief can be granted constitute an implicit recognition that such a right exists.

Mr. Perkins asks this court to decide the question presented in this petition to resolve the implicit conflict in the circuits, and, most importantly, because the question is one of extraordinary national significance.

Congress Intended to Create a Private Right of Action to Enforce the Act

The paramount consideration in determining whether to infer a private right of action under a federal statute is the intent of Congress. *Thompson v. Thompson*, 484 U.S. 174 (1988). As the court stated in *Thompson*:

> The implied cause of action doctrine would be a virtual dead letter were it simply limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an implied cause to action doctrine suggests, the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. We therefore have recognized that Congress' intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment. *Thompson*, 484 U.S. at p. 179. (citations omitted).

It is clear from the legislative history of the Act that Congress no longer believed that the existing statutory structure could provide meaningful relief to distressed farmer-borrowers. *Zajac*, 887 F.2d at pp. 854-855. Therefore, one version of the Senate bill for the Act, S. 1156, 100th Cong., 1st Sess., 133 Cong. Rec. 11750 (August 7, 1987) included an express private right to action, as did the version of the 1987 Act which the House sent to conference committee. H.R. 3030, 100th Cong., 1st Sess., 133 Cong. Rec. 7638, 7692 (September 21, 1987). However, the Senate conferees were directed to omit the express right of action included in the House bill because the Senate floor leaders were under the mistaken impression that such a right already existed, and that the House provision would unduly restrict this right. S. 1665, 100th Cong., 1st Sess., 133 Cong. Rec. 16993, 16995 (December 2, 1987).

The Senate's intent to create a private right to enforce the right of first refusal is also shown by Sen. Rep. 100-230, p. 35, 100th Cong., 1st Sess., which states that

farmer-borrowers whose land is transferred in violation of the right of first refusal may seek damages against FCS institutions. Thus, the legislative history of the Act demonstrates that Congress as a whole intended to allow private enforcement of the right of first refusal. The intent of the House to create that right is demonstrated by its enactment of an express private right of action. The intent of the Senate to create that right is demonstrated by the directions of the floor leaders guiding passage of the Act to the Senate conferees, and by the above-cited portions of Sen. R. 100-230.

The Remaining *Cort v. Ash* Factors Favor Recognition of a Private Right of Enforcement of the Right of First Refusal

Although the intent of Congress is the most important factor in determining whether a federal statute creates a private right of action, also of continued relevance are the remaining factors for determining this question set forth in *Cort v. Ash*, 422 U.S. 66 (1975): whether the plaintiff was one of the class for whose special benefit the statute was enacted, whether inferring a private right of action is consistent with the underlying purpose of the statute, and whether the cause of action is one traditionally relegated to state law.

As the panel opinion in *Zajac* recognized, farmer-borrowers are a protected class under the Act because its language and structure establish broad rights for borrowers and mandatory duties for lenders. A private cause of action will be readily found where the language of a statute explicitly confers a right directly on a class of

persons that includes the plaintiff. *Zajac*, 887 F.2d at 856 (citations omitted).

Inferring a private right of action would be consistent with the purposes of the Act, which include not only providing stability to the farm credit system, but also allowing family farmers to remain on their land. Preamble to P.L. 100-233; *Zajac*, 887 F.2d at pp. 854-855. Congress was careful to limit the right of first refusal to the beginning of the foreclosure sale process, and contemplated that this right would encourage negotiations between farmer-borrowers and FCS institutions which would frequently result in farmers' repurchase of their land at less than fair market value. The careful balance struck by Congress between the rights of farmer-borrowers and the needs of FCS institutions when it enacted the right of first refusal would be eliminated if farmers could not enforce this right. *Leckband v. Naylor*, 715 F.Supp. 1451, 1455 (D.Minn. 1988), *app. dismissed*, No. 88-5301 (8th Cir. June 8, 1989).

Furthermore, this court has been much more likely to infer a cause of action when a statute does not contain a comprehensive remedial scheme that indicates an intent to preclude other remedies. *Wright v. City of Roanoke Redevelopment Authority*, 479 U.S. 418, 423 (1987); *Middlesex County Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1,20 (1981). The administrative remedy contained in the Act, the power of the Farm Credit Administration to initiate and enforce cease and desist orders against FCS institutions, is neither comprehensive, timely, nor adequate to protect the right of first refusal. *Leckband*, 715 F. Supp. at p. 1455; *Zajac*, 887 F.2d at p. 855.

Finally, protecting the right of first refusal is not a traditional state concern. *Leckband*, 715 F. Supp. at p. 1455. The FCS is a nationwide system created by Congress, and the systemwide requirements of the Act are matters of federal importance and concern. *Zajac*, 887 F.2d at p. 856.

CONCLUSION

The question presented is of paramount importance to the FCS as a whole, to its lenders and borrower-shareholders, and, because of the 1987 infusion of federal funds into the system, the taxpayer as well. Moreover, the recent Fourth Circuit opinion in *Payne* appears to conflict with the holdings of the Eight, Ninth and Tenth Circuits that there is no private right to enforce the Act. Mr. Perkins therefore respectfully requests that his petition for certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CALVIN J. PERKINS, Plaintiff-Appellant, v. THE FARM CREDIT BANK OF WICHITA, formerly known as The Federal Land Bank of Wichita, a body corporate and federally chartered instrumentality of the United States organized pursuant to 12 U.S.C. Section 2011; KATHERINE A. WUNDERLICH; RODNEY C. CLASS-ERICKSON; CHERYL L. CLASS-ERICKSON, as assignees of the Farm Credit Bank of Wichita, Defendants-Appellees.	)	No. 90-1095 (D.C. No. 89-C-2034) (Dist. of Colorado) Filed AUG 17 1990

ORDER AND JUDGMENT*

Before ANDERSON, BALDOCK, and EBEL, Circuit Judges.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Calvin Perkins brought this action against the defendants for damages and other relief stemming from the foreclosure and transfer of his agricultural property. Perkins' complaint alleged noncompliance by the defendants with the Agricultural Farm Credit Act of 1987 ("the 1987 Act") which prescribes a right of first refusal prior to any transfer of foreclosed property. 12 U.S.C. § 2219a. The district court granted the defendants' motion to dismiss and motion for summary judgment on the ground that no private right of action exists for violations of the 1987 Act. This appeal followed.

This court has joined the Ninth Circuit in holding that no implied private right of action exists under the 1987 Act. *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22, 24 (10th Cir. 1990); *accord Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 867 (1990). *But see Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989) (vacated pending rehearing en banc). We view our decision in *Griffin* as dispositive; we decline to adopt Perkins' suggested approach of treating each individual section of the Act differently. As we noted in *Griffin*, the Ninth Circuit's decision in *Harper* adequately considered the relevant factors promulgated by the Supreme Court in determining that no implied private right of action exists. The reasoning of Harper is

applicable to the entire Act. *See Harper*, 878 F.2d at 1174-77 (citing, *e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 89-C-2034

CALVIN J. PERKINS,

Plaintiff(s),

v.

FARM CREDIT BANK OF WICHITA, et al.,

Defendant(s).

(Filed Mar. 10, 1989)

ORDER

CARRIGAN, J.

Plaintiff instituted this action under the Agricultural Credit Act of 1987, Public Law No. 100-233, ("the 1987 Act"), amending 12 U.S.C. §§ 2002 *et sec.*, to recover damages and to obtain injunctive and declaratory relief as a result of the defendants' alleged violation of the 1987 Act. Plaintiff has asserted claims for breach of fiduciary duty (First Claim); illegal conveyance (Second Claim); statutory violation (Third Claim); and violation of constitutional due process (Fourth Claim) based on allegations that he was not afforded his statutory right of first refusal to reacquire previously owned farm lands sold through foreclosure.

Defendants are the Farm Credit Bank of Wichita ("FCB"); Katherine A. Wunderlich; and Rodney C. and Cheryl L. Class-Erickson ("the Class-Erickson defendants").

Defendant FCB has filed a motion for summary judgment and judgment on the pleadings. The Class-Erickson defendants have filed a motion to dismiss the complaint. Plaintiff has responded by opposing both motions.

The parties have fully briefed the issues and oral argument would not assist my decision. Jurisdiction exists under 28 U.S.C. § 1331.

According to the complaint, in 1970, the plaintiff owned 9,200 acres of agricultural real estate in Archuleta County, Colorado. From 1970 through 1983, the plaintiff borrowed certain sums from the defendant FCB and its predecessors, the Federal Land Bank of Wichita and the Ninth District Production Credit Association of Wichita. As a result of the plaintiff's alleged default under the terms of the parties' promissory note and mortgage, in 1987 the defendant FCB initiated a judicial foreclosure action in Archuleta County District Court involving the plaintiff's agricultural lands. On May 27, 1987, the state court issued a judgment and decree of foreclosure scheduling the property for sale.

Plaintiff thereafter instituted Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the District of Colorado. Those proceedings were dismissed on October 6, 1988.

On March 28, 1989, a Sheriff's sale of the plaintiff's property was conducted in Archuleta County. Defendant FCB received Certificates of Purchase on certain parcels of the property subject to the plaintiff's right of redemption which was set to expire on September 28, 1989. In April and May 1989, the defendant FCB sold two of its

certificates of purchase to co-defendants Wunderlich and the Class-Ericksons.

Plaintiff failed to timely exercise his redemption rights and the defendants ultimately obtained Sheriff's deeds to the property. Plaintiff contends that these property transfers occurred without his consent and in violation of the 1987 Act.

In their dispositive motions, the defendants contend that 12 U.S.C. § 2219a(a), upon which this suit is predicated, does not provide the plaintiff with a private right of action to enforce the 1987 Act. Section 2219a(a) provides as follows

> "Agricultural real estate that is acquired by an institution of the [Farm Credit System] as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter in this section referred to as the 'previous owner') who, as determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter in this section referred to as 'acquired real estate') shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section."

In support of their argument, the defendants rely on *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1173 (9th Cir. 1989), in which the Court of Appeals for the Ninth Circuit concluded that the 1987 Act does not provide a private right of action. In reaching its conclusion, the appellate court analyzed the issue by applying the four factors enunciated in *Cort v. Ash*, 422 U.S. 66, 78 (1975): (1) whether the plaintiff is a member of a special class for whose benefit the statute was enacted; (2) whether legislative intent, explicit or implicit, indicates that a private

right of action has been created; (3) whether implying a private right of action is consistent with the underlying purposes of the legislative scheme; and (4) whether the claim created involves an area basically of state concern so that a private right of action based solely on federal law would be inappropriate.

The Ninth Circuit determined that its inquiry should focus on the intent of Congress in passing the 1987 Act. The court initially noted that no private right of action existed under various predecessor statutes to the 1987 Act. Congressional statements indicated that an express private right of action was proposed in both houses of Congress but was deleted in the 1987 Act's final conference version. Finally, the Ninth Circuit closely examined the 1987 Act, noting that it provided comprehensive administrative remedies through which the applicant/borrower, by counsel, may seek review of adverse decisions. As previously indicated, the *Harper* court concluded that no private right of action exists under the 1987 Act.

More recently, the federal district court in *Walker v. Federal Land Bank of St. Louis*, 726 F. Supp. 211 (C.D.Ill. 1989), reached the same conclusion based on somewhat different reasoning. The district court there stated:

> "[I]t is clear that the 1987 Act was carefully crafted to closely balance the competing interests of the Farm Credit System and the American farmers. Implying a private right of action would assuredly disrupt that close balance, and hence would clearly thwart the Congressional purpose." *Id.* at 217.

In his responsive brief, the plaintiff cites *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989) in which the Eighth Circuit Court of Appeals ruled that the 1987 Act did confer a private right of action. *Zajac* was followed in *Hill v. Farm Credit Bank of St. Louis*, 726 F. Supp. 1201 (E.D.Mo. 1989). *See also, Leckband v. Naylor*, 715 F. Supp. 1451 (D.Minn. 1988) (pre-*Zajac* opinion holding that 1987 Act creates implied private right of action). On December 7, 1989, however, the *Zajac* opinion was vacated and rehearing granted for *en banc* consideration. I thus do not consider *Zajac*, *Hill* or *Leckband* persuasive.

For the reasons stated in *Harper, supra*, and *Walker, supra*, I conclude that no private right of action exists under the 1987 Act. In so ruling, I note that I reached the same conclusion in considering the Farm Credit Act as amended in 1985. *Schroder v. Volcker*, 646 F. Supp. 132 (D.Colo. 1986), aff'd 864 F.2d 97 (10th Cir. 1988).

In *Renick Bros. v. Federal Land Bank Ass'n of Dodge City*, 721 F. Supp. 1198 (D. Kan. 1989), the court concluded that the 1987 Act created no implied right of action following the Ninth Circuit's rationale in *Harper, supra*, and two previous rulings by Judge Richard Rogers of that district on the same subject. *Id.* at 1200. Plaintiff in *Renick Bros.* sought damages and injunctive relief for alleged violations of the 1987 Act. Plaintiff's argument in the instant case that he has an enforceable private right of action for damages and an injunction under the 1987 Act is not supported by the law or the Act's legislative history.

Accordingly, IT IS ORDERED that:

1. Defendant Farm Credit Bank of Wichita's motion for summary judgment and judgment on the pleadings is granted;

2. The motion to dismiss filed by the defendants Rodney C. and Cheryl L. Class-Erickson is granted;

3. Plaintiff's complaint and action are dismissed; and

4. Each party shall pay his, her or its own costs.

Dated at Denver, Colorado March 16, 1990.

BY THE COURT:

/S/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

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/S/ Monique Alexander
Deputy Clerk
Dated: March 16, 1990
Re: 89-C-2034

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§ 2219a. Right of first refusal

(a) General rule. Agricultural real estate that is acquired by an institution of the System as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter in this section referred to as the "previous owner") who, as determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter in this section referred to as "acquired real estate") shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section.

(b) Application of right of first refusal to sale of property. (1) Election to sell and notification. Within 15 days after an institution of the System first elects to sell acquired real estate, or any portion of such real estate, the institution shall notify the previous owner by certified mail of the owner's right–

> (A) to purchase the property at the appraised fair market value of the property, as established by an accredited appraiser; or
>
> (B) to offer to purchase the property at a price less than the appraised value.

(2) Eligibility to purchase. To be eligible to purchase the property under paragraph (1), the previous owner must, within 30 days after receiving the notice required by such paragraph, submit an offer to purchase the property.

(3) Mandatory sale. An institution of the System receiving an offer from the previous owner to purchase the property at the appraised value shall, within 15 days after the receipt of such offer, accept such offer and sell the property to the previous owner.

(4) Permissive sale. An institution of the System receiving an offer from the previous owner to purchase the property at a price less than the appraised value may accept such offer and sell the property to the previous owner. Notice shall be provided to the previous owner of the acceptance or rejection of such offer within 15 days after the receipt of such offer.

(5) Rejection of offer of previous owner. (A) Duties of institution. An institution of the System that rejects an offer from the previous owner to purchase the property at a price less than the appraised value may not sell the property to any other person–

(i) at a price equal to, or less than, that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to purchase the property at such price or under such terms and conditions.

(B) Notice. Notice of the opportunity in subparagraph (A) shall be provided to the previous owner by certified mail, and the previous owner shall have 15 days in which to submit an offer to purchase the property at such price or under such terms and conditions.

(c) Application of right of first refusal to leasing of property. (1) Election to lease and notification. Within 15 days after an institution of the System first elects to lease acquired real estate, or any portion of such real estate, the institution shall notify the previous owner by certified mail of the owner's right–

(A) to lease the property at a rate equivalent to the appraised rental value of the

property, as established by an accredited appraiser; or

(B) to offer to lease the property at a rate that is less than the appraised rental value of the property.

(2) Eligibility to lease. To be eligible to lease the property under paragraph (1), the previous owner must, within 15 days after receiving the notice required by such paragraph, submit an offer to lease the property.

(3) Mandatory lease. An institution of the System receiving an offer from the previous owner to lease the property at a rate equivalent to the appraised rental value of the property shall, within 15 days after the receipt of such offer, accept such offer and lease the property to the previous owner unless the institution determines that the previous owner–

(A) does not have the resources available to conduct a successful farming or ranching operation; or

(B) cannot meet all of the payments, terms, and conditions of such lease.

(4) Permissive lease. An institution of the System receiving an offer from the previous owner to lease the property at a rate that is less than the appraised rental value of the property may accept such offer and lease the property to the previous owner.

(5) Notice to previous owner. An institution of the System receiving an offer from the previous owner to lease the property at a rate less than the appraised rental value of the property shall notify the previous owner of its acceptance or rejection of the offer within 15 days after the receipt of such offer.

(6) Rejection of offer of previous owner. (A) Duties of institution. An institution of the System rejecting an offer from the previous owner to lease the property at a rate less than the appraised rental value of the property may not lease the property to any other person–

(i) at a rate equal to or less than that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to lease the property at such rate or under such terms and conditions.

(B) Notice. Notice of the opportunity described in subparagraph (A) shall be given to the previous owner by certified mail, and the previous owner shall have 15 days after the receipt of such notice in which to agree to lease the property at such rate or under such terms and conditions.

(d) Public offerings. (1) Notification of previous owner. If an institution of the System elects to sell or lease acquired property or a portion thereof through a public auction, competitive bidding process, or other similar public offering, the institution shall notify the previous owner, by certified mail, of the availability of the property. Such notice shall contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms and conditions to which such sale or lease will be subject.

(2) Priority. If two or more qualified bids in the same amount are received by the institution under paragraph (1), such bids are the highest received, and one of the qualified bids is offered

by the previous owner, the institution shall accept the offer by the previous owner.

(3) Nondiscrimination. No institution of the System may discriminate against a previous owner in any public auction, competitive bidding process, or other similar public offering of property acquired by the institution from such person.

(e) Term or condition. For the purposes of this section, financing by a System institution shall not be considered to be a term or condition of a sale of acquired real estate.

(f) Financing. Notwithstanding any other provision of this section, a System institution shall not be required to provide financing to the previous owner in connection with the sale of acquired real estate.

(g) Mailing of notice. Notwithstanding any other provision of this section, each certified mail notice requirement in this section shall be fully satisfied by mailing one certified mail notice to the last known address of the previous owner.

(h) State laws. The rights provided in this section shall not diminish any such right of first refusal under the law of the State in which the property is located.

(i) Applicability. This section shall not apply to a bank for cooperatives.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1028

ROBERT HAVEN PAYNE,

Plaintiff-Appellant,

versus

FEDERAL LAND BANK OF COLUMBIA,

Defendant-Appellee,

MOUNTAIN FEDERAL LAND BANK ASSOCIATION; MOUNTAIN FARM CREDIT SERVICES; MAXIE LOVE, JR., in his capacity as President of the Federal Land Bank of Columbia; EDWIN E. FRIZZELL, in his capacity of Executive Vice President and Chief Credit Manager of the Mountain Farm Credit Services,

Defendants,

UNITED FARMERS ORGANIZATION,

Amicus Curiae.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Richard L. Voorhees, District Judge. (CA-88-145-A-C)

Argued: January 10, 1990 Decided: October 16, 1990

Before WIDENER and SPROUSE,* Circuit Judges, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge Widener wrote the opinion, in which Senior Judge Kellam joined.

ARGUED: Charles David Gantt, Asheville, North Carolina, for Appellant. Steven Kropelnicki, Jr., CARTER & KROPELNICKI, P.A., Asheville, North Carolina, for Appellee.

WIDENER, Circuit Judge:

Robert Haven Payne, appellant, is a farmer in Madison County, North Carolina. He purchased property in 1969 and mortgaged it to Federal Land Bank of Columbia to secure a loan. He defaulted on the loan and the bank foreclosed on the property. The bank bought the property at the foreclosure sale on December 3, 1987.

On April 21, 1988, the bank sent Payne a certified letter advising him that the property would be sold at a public auction on May 18, 1988. The letter notified Payne of his right to repurchase the property by matching the

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* Judge Sprouse was a member of the panel which heard oral argument in the case, but he later recused himself. He did not participate in the decision, which is filed by a quorum of the panel. 28 U.S.C. § 46(d).

high bid submitted at the auction. Payne did not bid at the auction or match the winning bid. As a result, the property was sold to a third party.

On June 3, 1988, Payne filed suit in United States District Court for the Western District of North Carolina claiming that the bank did not comply with a provision of the Agricultural Credit Act, 12 U.S.C. § 2219a (1989). The district court noted in its opinion that Payne filed a *lis pendens* and that the sale to the successful bidder at the auction has not been completed. On April 17, 1989, the district court dismissed the case under Fed. R. Civ. P. 12(b) (6) for failure to state a claim on which relief could be granted. As well, it dismissed Payne's motion for a temporary restraining order, preliminary injunction and partial summary judgment on grounds of mootness. Payne appeals from that judgment. The issue on appeal is whether the bank complied with its statutory obligation to give Payne a right of first refusal before selling the property to a third party.[1] We hold that it did not.

---

[1] The statute, 12 U.S.C. § 2219a, provides in pertinent part, with the catchline "Right of first refusal."

> **(a) General rule**
>
> Agricultural real estate that is acquired by an institution of the System as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter referred to in this section as the "previous owner") who, as determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter referred to in this section as "acquired real estate") shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section.

(Continued on following page)

Payne claims that subsections (a), (b) and (d) of the statute should each be given effect. In other words, to

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(Continued from previous page)

(b) Application of right of first refusal to sale of property

(1) Election to sell and notification

Within 15 days after an institution of the System first elects to sell acquired real estate, or any portion of such real estate, the institution shall notify the previous owner by certified mail of the owner's right–

(A) to purchase the property at the appraised fair market value of the property, as established by an accredited appraiser; or

(B) to offer to purchase the property at a price less than the appraised value.

(2) Eligibility to purchase

To be eligible to purchase the property under paragraph (1), the previous owner must, within 30 days after receiving the notice required by such paragraph, submit an offer to purchase the property.

(3) Mandatory sale

An institution of the System receiving an offer from the previous owner to purchase the property at the appraised value shall, within 15 days after the receipt of such offer, accept such offer and sell the property to the previous owner.

(4) Permissive sale

An institution of the System receiving an offer from the previous owner to purchase the property at a price less than the appraised value may accept such offer and sell the property to

(Continued on following page)

dispose of the property at a public sale, the bank must comply with subsections (a) and (b) as well as subsection

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(Continued from previous page)

the previous owner. Notice shall be provided to the previous owner of the acceptance or rejection of such offer within 15 days after the receipt of such offer.

(5) Rejection of offer of previous owner

(A) Duties of institution

An institution of the System that rejects an offer from the previous owner to purchase the property at a price less than the appraised value may not sell the property to any other person–

(i) at a price equal to, or less than, that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to purchase the property at such price or under such terms and conditions.

* * *

(B) Notice

Notice of the opportunity in subparagraph (A) shall be provided to the previous owner by certified mail, and the previous owner shall have 15 days in which to submit an offer to purchase the property at such price or under such terms and conditions.

* * *

(Continued on following page)

(d). This interpretation, however, is not consistent with the federal regulations which treat the subsections as alternatives. *See* 12 C.F.R. § 614.4522 (1989).[2] It is at once

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(Continued from previous page)

(d) Public offerings

(1) Notification of previous owner

If an institution of the System elects to sell or lease acquired property or a portion thereof through a public auction, competitive bidding process, or other similar public offering, the institution shall notify the previous owner, by certified mail, of the availability of the property. Such notice shall contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms and conditions to which such sale or lease will be subject.

(2) Priority

If two or more qualified bids in the same amount are received by the institution under paragraph (1), such bids are the highest received, and one of the qualified bids is offered by the previous owner, the institution shall accept the offer by the previous owner.

[2] The part of the regulation applying to sales of the acquired property parallels the statute except for the underscored portion. It states in pertinent part:

> *Except as provided in paragraph (e) of this section,* System institutions electing to sell acquired property . . .
>
> (1) Shall notify the previous owner by certified mail, within 15 days of the decision to sell the property, of the appraised fair market value of the property as established by an accredited appraiser and of the right:

(Continued on following page)

apparent that the portion of the regulation speaking to public sales, 12 C.F.R. § 614.4522(e), does not provide for a right of first refusal for a period of 30 days, a right explicitly given to the previous owners by subsections (a) and (b) of the statute. Indeed the regulation effectively reads subsection (b) out of the statute if the bank elects to sell at public auction. Thus, the question in this appeal is whether the interpretation of the statute provided by the regulations is "sufficiently reasonable" under *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), to be accepted by a reviewing court. Because the interpretation of the statute found in 12 C.F.R. § 614.4522 does not provide for a right of first refusal after the bank first "elects to sell" the property pursuant to § 2219a(a) and (b)(1), we are of opinion the interpretation found in the federal regulations is not reasonable and reverse.

(Continued from previous page)

> (i) To purchase the property at the appraised fair market value. . . .

12 C.F.R. § 614.4522 (c). Subsection (e) of the same regulation parallels subsection (d) of the statute and provides

> (e) System institutions electing to sell or lease acquired property or a portion thereof through a public auction, competitive bidding process, or other similar public offering:
>
> (1) Shall notify the previous owner, by certified mail, of the availability of such property. Such notice shall contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms or conditions to which such sale or lease will be subject. . . .

12 C.F.R. § 614.4522 (e)(1989).

The district court correctly noted that the origin of any statutory construction is the statute itself. *Payne v. Federal Land Bank of Columbia*, 711 F. Supp. 851, 853 (W.D.N.C. 1989) *quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Subsection (a) addresses in general terms the right of first refusal. It provides that the real estate *"shall be subject to the right of first refusal* of the previous owner to repurchase or lease the property, as provided in this section." 12 U.S.C. § 2219a(a) (emphasis added). The plain meaning of subsection (a), especially as annunciated by the notice required in § (b)(1), is that the property should first be offered to the previous owner before the property is sold or leased. The subsection addressing public offerings, subsection (d), however, does not refer to the right of first refusal as annunciated by the notice and offer provisions of § (b). Nothing in subsection (d) serves as any indication of any negation or watering down of the right of first refusal mentioned in subsections (a) and (b), granted in the same statute, and enacted at the same time.

As well as subsection (a), the language of subsection (b)(1) is quite clear and needs no construction. When the institution "first elects to sell" the property, it must follow the procedures set out in the remainder of subsection (b). Accordingly, when the institution "first elects to sell" the property, it must give the previous owner of the property notice of the right of first refusal to purchase the property at appraised value or to make an offer at less than appraised value. This section applies whether the property is to be sold at a private sale or a public auction. The terms of the statute are plain and unambiguous, which should be sufficient to end the discussion, for the

Supreme Court has stated, "[u]nless exceptional circumstances dictate otherwise, judicial inquiry into the meaning of the statute is complete once the Court finds that the terms of the statute are unambiguous." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

If that were not enough, however, the legislative history bolsters our conclusion. The part of legislative history which is given the most weight is the conference report. "Inasmuch as the conference report represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of the Congressional intent behind the enactment of the statute." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868 (1986).

The conference report indicates that both the House and the amended Senate versions of the legislation would establish a right of first refusal "under which the borrower would have the first option to reacquire the foreclosed property when the FCS institution disposes of it." 100th Cong., 1st Sess., 1987 U.S. Code Cong. & Admin. News 2956, 2971. There is no indication in a close reading of the legislative history that the right of first refusal described in subsections (a) and (b) of the statute is either superceded or was limited to that described in subdivision (d) of the statute by offering the property at public sale by auction or otherwise. Indeed, the conference report on this particular section of the legislation, which is found in 1987 U.S. Code Cong. & Admin. News at 2971-2973, on page 2971 describes the notice required by § (b)(1) as being "triggered" when the institution "first elects to sell" without other limitation and without reference to public sale. The notice provision of § (b)(1) was

"triggered" at the latest when the bank wrote its letter of April 21, 1988, yet the bank did not comply with § (b)(1) of the statute.

In addition to the literal wording of the statute and the legislative history, *Sutherland on Statutory Construction*, 4th Ed., Sands, § 46.05, p. 91, quoting from *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122, 202-03 (1819), on the subject of two provisions in the same instrument states:

> Yet, in most cases, the plain meaning of a provision not contradicted by any other provision in the same instrument, is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation, unite in rejecting the application.

We do not find that Congress did not mean what it said in subsections (a) and (b)(1) of the statute, much less that there is any absurdity or injustice in applying literally the provision for a first refusal.

In conclusion, supported by the plain language of the statute, the legislative history, *Sutherland*, and *Sturges*, we are of opinion that the bank was required to give Payne a right of first refusal under subsections (a) and (b)(1) of the statute.

The judgment of the district court is accordingly vacated and the case is remanded for proceedings not inconsistent with this opinion.

VACATED AND REMANDED

Supreme Court, U.S.
FILED
DEC 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-754

In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

THE FARM CREDIT BANK OF WICHITA, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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17

TABLE OF CONTENTS

Page

Table of Authorities with Citations ii

Summary of the Argument 1

The Argument

Obligations of Counsel Pursuant to Supreme Court Rule 15.1 2

There is no Conflict in the Decisions of Circuit Courts 5

There is no Important Question of Federal Law Which Should be Decided 7

Conclusion 9

TABLE OF AUTHORITIES WITH CITATIONS

Pages

CASES

Bowling v. Block, 785 F.2d 556 (6th Cir. 1986), *cert. denied*, sub nom. *Bower v. Lyng*, 479 U.S. 829, 107 S.Ct. 112 (1986) 7

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975) 7

Griffin v. Federal Land Bank of Wichita, 902 F.2d 22 (10th Cir. 1990) 5, 6

Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 867 (1990) 5, 6, 8

Hays v. L.C.I., Inc., 604 P.2d 861 (Okla. 1979) 4

Leckband v. Naylor, 715 F.Supp. 1451 (D.Minn. 1988), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989) 4

Neth v. Federal Land Bank of Jackson, 717 F.Supp. 1478 (S.D. Ala. 1988) 8

Payne v. Federal Land Bank of Columbia, No. 89-1028 (4th Cir. Oct. 16, 1990) 6

Perkins v. Farm Credit Bank of Wichita, No. 90-1095 (10th Cir. Aug. 17, 1990) 6

Redd v. Federal Land Bank of St. Louis, 851 F.2d 219 (8th Cir. 1988) 8

Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985) 7

Walker v. Federal Land Bank of St. Louis, 726 F.Supp. 211 (C.D. Ill. 1989) 8

Zajac v. Federal Land Bank of St. Paul, 887 F.2d 844 (8th Cir. 1989) 4, 5, 8

TABLE OF AUTHORITIES – Continued

Pages

Zajac v. Federal Land Bank of St. Paul, No. 88-5353ND (8th Cir. Dec. 7, 1989) (available on Lexis 18809) 4

Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990) 4, 5, 6

STATUTES AND REGULATIONS

Agricultural Credit Act of 1987, Pub. L. No. 100-233 ..... 2, 6, 8, 9

12 U.S.C. Section 2001, et seq. 7

12 U.S.C. Section 2202(a) 8

12 U.S.C. Section 2219(a) 2, 4, 8, 9

RULES

Supreme Court Rule 10.1(a) 1, 4, 5, 6

Supreme Court Rule 10.1(c) 2, 4, 7

Supreme Court Rule 15.1 ..... 2, 4

No. 90-754

In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

THE FARM CREDIT BANK OF WICHITA, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT FARM CREDIT BANK OF WICHITA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

There is no conflict amongst circuits of the United States Court of Appeals which have rendered decisions on the issue presented that would fall within the scope of Supreme Court Rule 10.1(a). The Eighth, Ninth and Tenth Circuits have ruled uniformly on the issue, and the Fourth Circuit did not address it.

The cases which have evaluated the issue of an implied private right of action in the Farm Credit Act of

1971 and its amendments, including the 1987 amendments, do not disclose an important question of federal law which has not been, but should be, settled by the Supreme Court as contemplated in Supreme Court Rule 10.1(c).

THE ARGUMENT

OBLIGATIONS OF COUNSEL PURSUANT TO SUPREME COURT RULE 15.1.

A. Respondent, Farm Credit Bank of Wichita[1], first addresses four perceived misstatements of fact contained in the petition.

> 1. Respondent believes the petitioner's intended conclusion on pages 2 and 3 of his petition is that the most significant purpose of the Agricultural Credit Act of 1987 is a farmers' rights act when it is not.
>
> The preamble to H.R. 3030, (the short title of which is "Agricultural Credit Act of 1987" Pub. L. No. 100-233), states as follows:
>
> > "An act to provide credit assistance to farmers to strengthen the Farm Credit System, to facilitate the establishment of secondary markets for agricultural loans and for other purposes."
>
> The issue before this Court is limited to Section 108 of Title I, now 12 U.S.C. § 2219(a). Viewed in proper perspective, the Act contains provisions for both borrowers' rights and

[1] The Farm Credit Bank of Wichita, a federally chartered corporation, has no parent or subsidiary company to be disclosed under Sup.Ct.R. 29.1.

duties, and for the protection of the Farm Credit System as well.

2. The second misstatement of fact is found on page 4 of the petition. Mr. Perkins states that he "lost the opportunity to repurchase his land at a market price as opposed to having to redeem it for the full amount of the debt."

The Sheriff's sale on the Perkins property was conducted pursuant to the State Court's order of sale, which is appended to this brief. (Appendix A). The sale was for 14 separate tracts of land, plus one for water rights, a total of 15 separate bids. At the sale, Farm Credit Bank bid for nine tracts plus the water rights and received certificates of purchase on each. Mr. Perkins could have redeemed any of the tracts without paying the full amount of the debt, contrary to what was stated in the petition. He would have only to pay the amount bid for any tract redeemed; an amount substantially less than the full amount of the debt.

3. The third perceived misstatement of fact arises on page 4 of the petition. By stating that "FCB conveyed its interest" in Parcels IV and IX, petitioner implies that respondent owned the property. This is incorrect. After the Sheriff's sale, but prior to obtaining any deed from the Sheriff, the Farm Credit Bank sold the certificates of purchase for Parcels IV, IX and the water rights to the other named respondents. Under Colorado law, the Farm Credit Bank never acquired title to this property.

4. The fourth perceived misstatement of fact is contained in the second paragraph on page 4 of the petition. The statements as to "key parcel" and "financing" were alleged in the original complaint and denied by Farm Credit Bank so they have never been proven as facts,

because the case was decided on summary judgment.

B. The petition cites two cases as authority in support for various propositions raised. We perceive these to be misstatements of the law and set them out as required by Supreme Court Rule 15.1.

1. The first of these cases is *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989). This case is cited five times in the petition on pages 6, 7, 8, 9 and 10.

Zajac was vacated by the United States Court of Appeals for the Eighth Circuit on December 7, 1989, *Zajac v. Federal Land Bank of St. Paul*, No. 88-5353ND (8th Cir. Dec. 7, 1989) (available on Lexis 18809). (Text of the vacation order is Appendix B.) A vacated case is a case which has been eliminated, set aside, void or a nullity. Consequently, for purposes of citation, it cannot be the law. (See: *Hays v. L.C.I., Inc.*, 604 P.2d 861 (Okla. 1979)). Therefore, we believe the citation of the vacated *Zajac* case to be a misstatement of law.

2. The second case is *Leckband v. Naylor*, 715 F.Supp. 1451 (D.Minn. 1988), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989). *Leckband* was a case involving 12 U.S.C. § 2219(a). On May 17, 1988, that Court found that a private right of action existed under Section 2219(a) of the Act. However, this case is effectively overruled by the en banc decision *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990). At best, *Leckband* might be considered as argument for the issue in this case, but not as a reason for granting certiorari under the provisions of Supreme Court Rules 10.1(a) and 10.1(c).

THERE IS NO CONFLICT IN THE DECISIONS OF CIRCUIT COURTS.

Supreme Court Rule 10.1(a) identifies a conflict of decisions between various circuits of United States Court of Appeals on the same issue as a factor to be considered in granting a petition for certiorari. There is no conflict among the circuits as to an implied private right of action in the 1987 amendments to the Farm Credit Act.

The first to decide the matter was the Ninth Circuit. On June 27, 1989, *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 867 (1990), held that no implied private right of action existed in the 1987 Act.

Harper petitioned for certiorari based upon a conflict between the Ninth Circuit and the Eighth Circuit because of the decision in *Zajac* before it was vacated. When *Zajac* was vacated and the brief in opposition was submitted to this Court on December 22, 1989, certiorari was denied on January 22, 1990.

While the *Zajac* on rehearing decision was pending, the United States Court of Appeals for the Tenth Circuit was considering *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990), then on appeal from the District Court of Kansas. On May 2, 1990, the Tenth Circuit Court followed *Harper* and found no implied private right of action.

The next significant case was the en banc decision of the Eighth Circuit in *Zajac*, 909 F.2d 1181 (8th Cir. 1990), decided on July 31, 1990, which followed *Harper* (reversing its vacated panel decision) and held no implied private right of action under the 1987 Act.

On August 17, 1990, the Tenth Circuit, in the case at bar, followed *Harper, Zajac* and its own case, *Griffin*, and in its unpublished opinion held Mr. Perkins had no private right of action. *Perkins v. Farm Credit Bank of Wichita*, No. 90-1095 (10th Cir. Aug. 17, 1990).

Petitioner argues that *Payne v. Federal Land Bank of Columbia*, No. 89-1028 (4th Cir. Oct. 16, 1990), created a split in the circuits with respect to the issue of the creation of an implied private right of action. (See petition pages 5 and 6.) Such is not the case. The matter of a private right of action was discussed in the brief of *Payne* before the Fourth Circuit Court of Appeals. However, the matter did not become an issue because the Federal Land Bank of Columbia, in its reply brief, specifically conceded the matter with the following language:

> "To begin with, the Land Bank will concede for purposes of this appeal that the statute in question creates rights which are enforceable by previous owners such as Mr. Payne."

Therefore, the issue of a private right of action, being implied by the Agricultural Credit Act of 1987, was not before the Fourth Circuit Court, and we can only speculate how that Court would have ruled had that issue been before it.

Under the circumstances, we do not have a conflict amongst the circuits of the United States Court of Appeals. Even the petitioner is less than emphatic about a conflict between the circuits, as the petition, on page 5, states there "appears to be a split". This falls short of the requirement of Supreme Court Rule 10.1(a).

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED.

The petitioner asserts he has submitted before this Court "an important question of federal law which has not been, but should be, settled by this Court." Other than to paraphrase Supreme Court Rule 10.1(c), no authority is cited for this proposition.

Respondent, Farm Credit Bank, does not believe the issue submitted by the petitioner represents an important question of federal law meeting the test of Supreme Court Rule 10.1(c), nor do any special and important reasons exist for the granting of a petition for certiorari.

A brief historical look at the Farm Credit Act should help demonstrate the validity of respondent's position. In looking at the annotations of the Farm Credit Act of 1971, 12 U.S.C. § 2001, et seq., it may be noted there are very few cases of any nature, which interpreted the Act up until 1984.

As the agricultural economy of the country began to deteriorate in the mid-eighties, litigation with respect to the Farm Credit Act increased. The issue of whether or not an implied private right of action existed under the 1971 Act was addressed. The leading cases were *Bowling v. Block*, 785 F.2d 556 (6th Cir. 1986), *cert. denied*, sub nom. *Bower v. Lyng*, 479 U.S. 829, 107 S.Ct. 112 (1986) and *Smith v. Russellville Production Credit Association*, 777 F.2d 1544 (11th Cir. 1985). *Bowling* applied the four elements necessary for finding an implied private right of action set forth by *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975) and found that no implied private right of action existed under the 1971 Act.

The private right of action issue was at rest until the 1985 amendments to the Farm Credit Act became law. The Courts were once again asked to determine whether the 1985 amendments created an implied private right of action.

A number of Federal District Courts and State Courts considered the implied private right of action issue in the 1985 amendments. The last word appears to be found in *Redd v. Federal Land Bank of St. Louis*, 851 F.2d 219 (8th Cir. 1988), holding that the 1985 amendments did not create an implied private right of action. We find no cases on the 1985 amendments where a petition for certiorari was filed.

The next amendment to the Farm Credit Act was the enactment of the Agricultural Credit Act of 1987, Pub. L. No. 100-233. This brief in opposition has already discussed the holdings of four of the circuits of the United States Court of Appeals on the issue of an implied private right of action in the 1987 amendments.

Two District Courts in other circuits have addressed the implied private right of action issue as to the 1987 Act. In Alabama, *Neth v. Federal Land Bank of Jackson*, 717 F.Supp. 1478 (S.D. Ala. 1988), no private right of action under 12 U.S.C. § 2219(a) was found. In Illinois, *Walker v. Federal Land Bank of St. Louis*, 726 F.Supp. 211 (C.D. Ill. 1989), held no implied private right of action existed. While Walker is a restructure case, (12 U.S.C. § 2202(a)), its analysis is significant because it was decided after *Harper* but prior to the vacation of *Zajac*.

Lower courts have demonstrated sufficient uniformity in method and decision to render certiorari on the issue presented in this case unnecessary.

CONCLUSION

The petitioner's claim that a conflict exists amongst the circuits of the United States Court of Appeals is illusory. The cases clearly show no such conflict exists.

The decisions of the various circuits of the United States Court of Appeals, as well as those in the United States District Courts, show a uniform evaluation of the issue of an implied private right of action with respect to § 2219(a) of the Agricultural Credit Act of 1987. Their ability to consistently resolve this issue demonstrates that it is not such an important question of federal law that certiorari should be granted.

Therefore, respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Counsel for Respondent
The Farm Credit Bank of Wichita

Date: December 10, 1990

APPENDIX

DISTRICT COURT, COUNTY OF ARCHULETA,
STATE OF COLORADO
CASE NO. 87CV16

ORDER FOR SALE

FEDERAL LAND BANK OF WICHITA and NINTH DISTRICT PRODUCTION CREDIT ASSOCIATION OF WICHITA, f/k/a SOUTHWEST PRODUCTION CREDIT ASSOCIATION,

Plaintiffs,

-vs-

CALVIN PERKINS a/k/a CALVIN J. PERKINS, EATON INTERNATIONAL CORPORATION n/k/a FAIRFIELD PAGOSA, INC., COLORADO LAND TITLE COMPANY as nominee, DWIGHT A. SOSSAMAN, GRACE A. SOSSAMAN, JOHN C. PERKINS, WARDLOW LANE, and TINNIE LATTIN, as Public Trustee of Archuleta County, Colorado,

Defendants.

The matter of the method of sale on execution to a judgment and decree of foreclosure entered effective May 19, 1987, came before this Court May 27, 1987. All plaintiffs and defendants were represented by counsel, save and except the Public Trustee of Archuleta County.

After consideration of the factual data and arguments submitted, the Court finds that the equitable doctrine of marshalling should apply and the property should be sold in parcels in order to assist in maximizing the proceeds of the sale and to provide an opportunity for the defendant Calvin Perkins and junior lienholders to redeem parcels of land to protect their investment.

IT IS THEREFORE ORDERED that properties be sold in parcels generally as set forth on Exhibit "C" attached to the judgment and decree. Other property interests shall be sold as described in the mortgage or deed of trust. Water rights shall be sold with the lands they irrigate so far as is practicable, except that one second foot in the Pagosa Lumber Company Ditch No. 1 under priority 132 (75A), which apparently irrigates Parcel No. IV, shall be sold separately of Parcel No. IV. The last parcels to sell shall be sold in the following order:

Parcel VII, VIII, X, XII, XIII and XIV.

The sale shall be conducted by the Sheriff of Archuleta County pursuant to writ of execution issued out of this Court advertising and sale conducted by law.

Signed this 27th day of May, 1987.

BY THE COURT

/s/ Al H. Haas
JUDGE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-5353ND	*	
Raymond P. Zajac and Helen Ann Zajac,	*	Appeal from the United States District Court for the District of North Dakota
Appellants.	*	
vs.	*	
Federal Land Bank of St. Paul,	*	
Appellee.	*	

The panel opinion filed and the judgment entered on October 5, 1989 are vacated, and appellee's suggestion for rehearing en banc is granted. The case is set for oral argument before the Court en banc at 8:30 a.m. on Friday, January 19, 1990, in the U.S. Court and Custom House in St. Louis, Missouri. Argument is limited to fifteen (15) minutes per side.

Counsel may simultaneously file, within thirty (30) days of the date of this order, supplemental briefs which are not duplicative of the briefs originally filed. The supplemental brief should not exceed fifteen (15) pages in length.

December 7, 1989.

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain.
Clerk, U.S. Court of Appeals, Eighth Circuit.

(3)

No. 90-754

Supreme Court, U.S.
FILED
DEC 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

FARM CREDIT BANK OF WICHITA, KATHERINE A. WUNDERLICH, RODNEY C. CLASS-ERICKSON AND CHERYL L. CLASS-ERICKSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RODNEY AND CHERYL CLASS-ERICKSON IN OPPOSITION

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QUESTION PRESENTED

Is there an implied private right of action to enforce the provisions of the Agricultural Credit Act of 1987, 12 U.S.C. § 2219a *et seq.*?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 2

NO GROUNDS EXIST FOR GRANTING CERTIORARI 2

A. No conflict exists among the circuit courts who have expressly considered the issue before the Court 2

B. The Decision of the Tenth Circuit is correct and does not merit review by this Court 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) 5, 6, 9, 10

Federal Land Bank of St. Paul v. Overboe, 404 N.W.2d 445 (N.D. 1987) 8

Griffin v. Federal Land Bank of Wichita, 902 F.2d 22 (10th Cir. 1990) 2

Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), *cert. denied* 110 S.Ct. 867 (1990) 2, 5, 7, 8

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) 6

MidAtlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) 8

Middlesex County Sewerage Auth. v. National Sea Clammers Assn, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) 6

Payne v. Federal Land Bank of Columbia, 916 F.2d 179 (4th Cir. 1990) 3

Regan v. Wald, 468 U.S. 222, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984) 7

Thompson v. Thompson, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988) 6

Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990) 2, 3, 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Agricultural Credit Act of 1987, 12 U.S.C. § 2219a *et seq.* i

MISCELLANEOUS

133 Cong. Rec. 16993, 16995 (December 2, 1987)..... 7

H.R. Conf.Report No. 100-490, 100th Cong., 1st Sess., 178..... 7

Sen. Rep. 100-230, 100th Cong., 1st Sess., p. 35.....8, 9

STATEMENT OF THE CASE

The Petitioner, Calvin Perkins ("Perkins"), owned approximately 9,200 acres of agricultural land in Archuleta County in southern Colorado. Petitioner gave that property as collateral for loans from the Respondent, Farm Credit Bank of Wichita ("FCB"). After Petitioner defaulted on his loans from FCB, FCB filed a judicial foreclosure action in Colorado state court. The state court action ended in a decree of foreclosure on May 27, 1987, affecting all of Mr. Perkins' 9,200 acres. After Petitioner's subsequent bankruptcy proceedings were dismissed, a sheriff's sale of the property was held on March 28, 1989, under Colorado state law. FCB received certificates of purchase to various parcels of Petitioner's property. Under Colorado law, a certificate of purchase conveys title to real property subject to a statutory redemption right, during which the debtor can re-acquire the property by paying the debt. Petitioner's right of redemption ended on September 28, 1989. Mr. Perkins never exercised his right of redemption.

Before the expiration of Mr. Perkins' right of redemption, FCB sold a certificate of purchase for a parcel of the property to the Respondents, Rodney and Cheryl Class-Erickson, and certificates of purchase to two parcels to the Respondent, Katherine Wunderlich. Under Colorado law, after Petitioner's redemption right expired, the certificates of purchase in the hands of FCB, the Class-Ericksons, and Mrs. Wunderlich ripened into fee title.

In November 1989, Petitioner attempted to assert a private action under the Agricultural Credit Act of 1987 (the "Act"), in which he sought injunctive relief and

damages against FCB, and also sought declaratory relief to invalidate the transfers of property to the Class-Ericksons and Mrs. Wunderlich. The various claims were premised on the alleged failure of FCB to comply with one part of the Act which requires the farmer-debtor to be given a right of first refusal to reacquire property foreclosed on by a Farm Credit System Bank. The Honorable Jim R. Carrigan, United States District Court for the District of Colorado, dismissed that action by Order dated March 16, 1990, on grounds no implied private right of action exists under the Act. The Court of Appeals for the Tenth Circuit affirmed that Order on August 17, 1990.

ARGUMENT

NO GROUNDS EXIST FOR GRANTING CERTIORARI

A. No conflict exists among the circuit courts who have expressly considered the issue before the Court

Three Circuit Courts of Appeal have considered the issue presented by the Petition. The Ninth, Tenth and Eighth Circuits have concluded without exception that no implied private right of action exists under the Act. *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied* 110 S.Ct. 867 (1990); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990); *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990).

Petitioner asserts that there "appears" to be an "implicit" conflict among the circuits on this issue. In support, he cites two decisions: an earlier decision of a

panel of the Eighth Circuit in *Zajac* (reported at 887 F.2d 844 (1989)) in which an implied private right of action was recognized, and *Payne v. Federal Land Bank of Columbia*, 916 F.2d 179 (4th Cir. 1990). Neither decision creates the conflict posited by Petitioner, and neither justifies the extraordinary remedy of certiorari.

The earlier opinion in *Zajac* relied on by Petitioner was withdrawn and reversed by the Eighth Circuit acting *en banc*. It is bizarre to argue, as Petitioner does, that an "implicit" conflict was created by a decision that was expressly overturned, *en banc*, by the very circuit court whose panel originally issued it. It is, however, consistent with Petitioner's theory as to legislative intent. For just as Petitioner argues that a conflict is created among the circuits by an Eighth Circuit panel opinion that was later withdrawn and overturned by the Eighth Circuit *en banc*, he argues that despite the fact that Congress included a private right to sue in drafts of the Act, but then deleted those rights from the final bill, Congress implicitly intended that such rights exist. Both arguments are circular and fall of their own weight.

Nor is a conflict created by the *Payne* decision. There is nothing in that opinion, or indeed in the decision of the District Court below (reported at 711 F.Supp. 851 (W.D. N.Car. 1989)), to indicate that the issue of an implied private right of action was ever raised or considered by those courts. The Fourth Circuit has thus never directly decided that an implied private right of action exists, and so has not rendered an opinion in conflict with the three circuits that have ruled no such action exists. The mere fact that the *Payne* decision discusses remedies available

to farmer-borrowers, without considering the initial jurisdictional issue involved here, does not create the conflict among circuits sufficient under Sup. Ct. R. 10.1(a) to invoke certiorari.

Finally, no conflict among the circuits is created by the dissent from the *en banc* opinion in *Zajac*. First, the mere fact that a minority of judges on one circuit dissents on an issue does not meet the standards for certiorari in Sup. Ct. R. 10.1 (a), especially where the formal decisions of all circuit courts are in agreement on the issue. Second, even the dissenting opinion of Judge Heaney in *Zajac* would not support an implied private action in the circumstances of the case at bar. In Judge Heaney's dissent, he was careful to point out that he would support a private action under the Act only where injunctive relief was sought to compel prospective compliance with the procedures created by the Act. *Zajac* at 1196. In this case, by contrast, Petitioner does not seek merely injunctive relief to enforce compliance with the Act's procedures. Instead, Petitioner wishes to assert a private action for damages against the FCB, and seeks to invalidate title to real property in the hands of remote grantees, such as the Class-Ericksons and Mrs. Wunderlich. No decision, not the limited opinion in *Payne*, not the withdrawn panel opinion in *Zajac*, not the dissent from the *en banc* opinion in *Zajac*, would support an implied private action of the sort Petitioner wishes to assert here. Indeed, of all of the cases that have been decided thus far by courts of appeal under the Act, the case at bar is the most far-reaching in its implications for the Farm Credit System as a whole, and also seeks sanction for the most extensive federal intrusion possible into areas traditionally relegated to

state law: i.e., title to real property and restraints on the free alienation of real property, to name but a few.

Just this year this Court refused to grant certiorari in *Harper*, where the action by the farmer-borrower sought only a temporary injunction to prevent completion of a foreclosure pending compliance with the debt-restructuring provisions of the Act. If certiorari was not appropriate in *Harper*, it is singularly inappropriate in this case, where the farmer-borrower seeks to assert a private action with such profound and unsettling implications for areas of traditional state concern.

B. The Decision of the Tenth Circuit is correct and does not merit review by this Court

Petitioner seeks to invoke certiorari under Sup. Ct. R. 10.1(c), by arguing that the Tenth Circuit's decision ignores the intention of Congress that an implied private right of action exist under the Act, and this Court should therefore decide this important federal question. There is no merit to this argument, particularly in this case.

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), establishes four tests for implied private rights of action under federal statutes: first, is the plaintiff one of the class for whose special benefit the statute was enacted?; second, is there any indication of congressional intent either to create or to deny such a remedy?; third, is inferring a private right of action consistent with the underlying purposes of the act?; and fourth, is the claim asserted traditionally relegated to state law, so that it would be inappropriate to confer a cause of action based solely on federal law? This Court's decisions after *Cort*

have emphasized the decisive importance of the third factor in the *Cort* analysis. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 105 S.Ct. 3085, 3092, 87 L.Ed. 2d 96 (1985); *Thompson v. Thompson*, 484 U.S. 174, 179, 108 S.Ct. 513, 516, 98 L.Ed.2d 512 (1988) (no private remedy will exist if evidence of congressional intent cannot be found or inferred from the structure of the act or some other source). A review of available evidence of congressional intent indicates that the Tenth Circuit decision was correct and is not appropriate for review by certiorari.

A review of the Act itself creates no inference of an intent that private actions be permitted to enforce it. As the Ninth Circuit in *Harper* found, Congress created an elaborate administrative scheme to implement the Act. In the absence of strong contrary congressional intent, the necessary conclusion is that Congress, by creating an administrative enforcement scheme, provided precisely the remedies it considered appropriate. *Harper* at 1176, quoting from *Middlesex County Sewerage Auth. v. National Sea Clammers Assn*, 453 U.S. 1, 14-15, 101 S.Ct. 2615, 2623, 69 L.Ed.2d 435 (1981). No strong contrary evidence of congressional intent exists.

First, as Petitioner himself concedes, during consideration of the Act, an express private right of action was proposed in both houses of Congress. The fact that these were dropped from the final Act as passed creates, at the least, an inference that Congress did not include such private rights because it did not desire such private actions to enforce the Act. Despite this, Petitioner argues that isolated statements (well before the Act reached its final form) by a few legislators establish an intention that a private action be permitted, because these members of

Congress mistakenly thought private rights of action were permitted under earlier law. S. 1665, 100th Cong., 1st Sess., 133 Cong. Rec. 16993, 16995 (December 2, 1987). However, as the Eighth Circuit recognized in *Zajac*, a conference committee report represents a statement on the final terms agreed to by both houses of Congress, and next to the statute itself, it is the single most persuasive source of congressional intention. *Zajac* at 1182. There is nothing in the conference committee report leading up to the Act which indicates that the committee gave any weight to the statements made on the floor by members about their mistaken impression of the availability of private actions. Indeed, the conference committee report states only that the committee chose to delete the private right of action provisions from the final bill. See H.R. Conf.Report No. 100-490, 100th Cong., 1st Sess., 178. reprinted in 1987 U.S. Code Cong. & Admin. News 2723, 2973. Under these circumstances, as the Ninth Circuit recognized in *Harper*:

> "To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President."

878 F.2d at 1176, quoting *Regan v. Wald*, 468 U.S. 222, 237, 104 S.Ct. 3026, 3035, 82 L.Ed.2d 171 (1984).

Further, even if the dubious premise were accepted that statements on the House and Senate floor concerning private rights to sue were deemed appropriate guideposts of the intent of the full Congress, the reasonable conclusion from the available evidence does not support

the interpretation advanced by Petitioner. It was well settled that no implied private right of action existed under the statutes and regulations in force before the 1987 Act. See, *Harper* at 1175 and cases cited therein. At the same time, state courts recognized pre-Act statutes and regulations as effective affirmative defenses in state court foreclosure actions. See, e.g., *Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445 (N.D. 1987). Certainly, the normal rule of statutory construction is that if Congress intends legislation to change the interpretation accorded by the judiciary, it makes that intention specific, and otherwise accedes to the pre-existing judicial interpretation. *MidAtlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 501, 106 S.Ct. 755, 759, 88 L.Ed.2d 859 (1986). Here, the conference committee report contains no expression of intent to favor additional private rights of action beyond those already recognized in the case law. As a consequence, the reasonable presumption is that the Congress, if it considered the issue at all, favored those private actions recognized in existing case law (i.e., the assertion of the mandatory requirements of the Act as affirmative defenses in state foreclosure actions). The deletion in conference committee of any provision for federal jurisdiction over such private actions militates against any broader interpretation of the intention of Congress, such as that advanced here by Petitioner.

In addition, the early legislative history on which Petitioner relies also contains evidence that Congress never favored private rights of action for the very type of claims Petitioner asserts here against the Class-Ericksons and Mrs. Wunderlich. Senate Report 100-230 dealt with

one of the early versions of the Act upon which Petitioner bases his claim of congressional intent. In that report, the Senate Committee on Agriculture, Nutrition and Forestry stated as follows concerning the farmer-borrower's right of first refusal:

> These rights of first refusal are not, in any manner, intended to impair or encumber the marketability of such land – thus they should not be read to mean that clear title could ever be impaired or clouded by non-compliance with those provisions. . . . Of course, failure of System institutions to comply with these requirements could result in liability to the previous owner, but will not cloud the title to that land. . . .

Sen. Rep. 100-230, p. 35, 100th Cong., 1st Sess. The claims Petitioner seeks to assert against FCB, the Class-Ericksons and Mrs. Wunderlich attempt to impair and encumber the title and marketability to their land. Thus, even if Petitioner were right that some of the Act's early legislative history might favor implied private rights of action, that history is clear that Congress never intended private actions such as Petitioner wishes to pursue. Thus, even if Petitioner's argument about congressional intent were otherwise valid, it is clear that this case is not an appropriate candidate for certiorari even under a reading of legislative intent most sympathetic to Petitioner.

One additional part of the *Cort* test that Petitioner cannot show is that the action he seeks to pursue is not one traditionally relegated to state law. Contrary to Petitioner's argument, the action he asserts is one in the nature of a quiet title decree for real property. In the case of the Class-Ericksons and Mrs. Wunderlich, Petitioner

seeks declaratory relief to invalidate fee title to real property in their hands, and in the case of FCB, he seeks to encumber or impair the marketability of fee title in its name. Clearly, such an action touches upon one of the most central concerns of state law – governance of the ownership of private property within its boundaries, the encumbrance of the title to such land, and potential restraints on the free alienation of land within the state's boundaries. These are among the oldest aspects of property law traditionally relegated to state control. To permit Petitioner to assert such an action would sanction the most intrusive federal intervention possible into a traditional area of state concern. For this reason alone, the Tenth Circuit's holding was correct under *Cort*, and the Petition must be denied.

CONCLUSION

The issue of whether the Act contains an implied private right of action is one on which the courts of appeal have been in agreement. It is also one in which the structure of the Act itself, and the conference committee reports (which are the most relevant legislative history next to the Act), strongly support the propriety of the Tenth Circuit decision. Finally, the action Petitioner wishes to pursue is one Congress plainly would not have favored even under Petitioner's own legislative history analysis, and it would involve a broad and far-reaching intrusion into the governance of title to and ownership of real property, which is an area of strong and central concern to the states. For all of these reasons, these

Respondents request that the petition for certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

(4)

No. 90-754

In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

THE FARM CREDIT BANK OF WICHITA, CHERYL CLASS-ERICKSON, RODNEY CLASS-ERICKSON AND KATHERINE WUNDERLICH,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 90-754

In The

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THE FARM CREDIT BANK OF WICHITA, CHERYL CLASS-ERICKSON, RODNEY CLASS-ERICKSON AND KATHERINE WUNDERLICH,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Calvin J. Perkins files this Reply Brief in support of his Petition for Certiorari pursuant to Supreme Court Rule 15.6 to address three new arguments first raised by Respondent Farm Credit Bank of Wichita (hereinafter "FCB") in its Brief in Opposition to Mr. Perkins' Petition for Certiorari (hereinafter "FCB's Brief").

FCB claims at page 2 of its Brief that Mr. Perkins' "intended conclusion" that Pub.L. 100-233, the Agricultural Credit Act of 1987 (hereinafter "the Act"), is "primarily" a farmer's rights act constitutes a misstatement of fact. Unfortunately, FCB has chosen to rely on an inaccurate quotation to the Act's preamble, which substantially distorts the preamble's meaning, in support of this accusation.

As quoted by FCB, the Act's preamble reads in pertinent part:

> "An Act to provide credit assistance to farmers to strengthen the Farm Credit System . . . "

FCB's Brief, p.2.

Thus, as quoted, it appears that credit assistance is provided to farmers only for the purpose of strengthening the Farm Credit System. However, the actual preamble states that the purposes of the Act are:

> "[t]o provide credit assistance to farmers, to strengthen the Farm Credit System . . . "

101 Stat. 1568 (emphasis added).

Thus, contrary to the representations contained in FCB's Brief, Congress explicitly stated in the preamble to Pub. L. 100-233 that providing credit assistance to farmers was a separate purpose of the Act; such assistance was not provided merely for the purpose of strengthening the Farm Credit System.

FCB also asserts that Mr. Perkins could have exercised his right of redemption merely by paying the amount bid for each tract at the sheriff's foreclosure sale. FCB's Brief, p. 3. This assertion is inaccurate. In order to

exercise his right of redemption under Colorado law, Mr. Perkins would not only have had to pay the amount bid at the foreclosure sale, but also any post-judgment interest, taxes paid, and any "other proper charges as now required by law" (which charges would have included FCB's attorney fees). C.R.S. § 38-39-102(1) and (2)(a) (App. A, app. 1). FCB is correct that in this case the amount bid at the foreclosure sale to acquire certificates of purchase to Parcels IV and IX of Mr. Perkins' land, plus the water rights, was necessarily less than the debt owed FCB by Mr. Perkins because his land was sold in parcels. However, Mr. Perkins was harmed by FCB's failure to afford him his right of first refusal provided in 12 U.S.C. § 2219a because he was not given the opportunity to reacquire his land at its appraised value or less as required by the Act.

Finally, FCB's contention that the statements contained in Mr. Perkins' Petition for Certiorari as to the key parcel of his land and the availability of financing were mere unproven allegations in his original complaint, FCB's Brief, pp. 3-4, is somewhat misleading. Mr. Perkins filed his own affidavit in opposition to FCB's Motion for Summary Judgment stating that the parcel transferred to Ms. Wunderlich was the headquarters of his ranching operation. (App. B, app. 3, 5). He also filed an affidavit from Dr. Jacobs stating that Dr. Jacobs would have been seriously interested in assisting him in reacquiring the headquarters to his ranching operation had FCB offered him a right of first refusal in the Spring of 1989. (App. C, app. 7-8). FCB filed no affidavits or other documents with the district court showing that there was a genuine

dispute of material fact as tc these statements. It is therefore difficult to see upon what basis FCB has accused Mr. Perkins of misstating the facts concerning the key parcel to his land and the availability of financing.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

§ 38-39-102. Redemption within specified period – procedure

(1) Except as provided in this section with respect to agricultural real estate or, from July 1, 1987, until January 31, 1989, with respect to an agricultural residence as provided in section 38-39-102.5, within seventy-five days after the date of the sale of real estate by virtue of any foreclosure of a mortgage, trust deed, or other lien or by virtue of an execution and levy, the owner of the premises or any person who might be liable upon a deficiency may redeem the premises sold by paying to the public trustee, sheriff, or other proper officer the sum for which the property was sold, with interest from the date of sale at the default rate if specified in the original instrument or, if not so specified, at the regular rate specified in the original instrument, together with any taxes paid or other proper charges as now provided by law, and a certificate of redemption shall be executed by the proper officer and recorded, and the public trustee, sheriff, or other proper officer shall forthwith pay said money to the holder of the certificate of purchase. If the owner of the premises fails to redeem under this section, any person who might be liable upon a deficiency who redeems under this section shall be issued a certificate of redemption only after the expiration of the proper redemption period.

(2)(a) In the case of any mortgage or deed of trust upon one or more parcels of real estate, all of which were agricultural real estate both upon the date of recording of such mortgage or deed of trust and on the date of the

foreclosure sale, the period within which the owner of the premises or any person who might be liable upon a deficiency may redeem the premises sold is six months.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Case No. 89-C-2034

CALVIN J. PERKINS,

Plaintiff,

v.

FARM CREDIT BANK OF WICHITA, fka The Federal Land Bank of Wichita, a body corporate and federally chartered instrumentality of the United States organized pursuant to 12 U.S.C. Section 2011; and KATHERINE A. WUNDERLICH and RODNEY C. CLASS-ERICKSON and CHERYL L. CLASS-ERICKSON, assignees of the Farm Credit Bank of Wichita,

Defendants.

AFFIDAVIT OF CALVIN J. PERKINS
(Filed March 2, 1990)

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Calvin J. Perkins, being of lawful age do hereby attest as follows:

1. My name is Calvin J. Perkins and I am a Plaintiff in Perkins v. Farm Credit Bank of Wichita, et al, Case No. 89-C-2034.

2. I purchased approximately 26,000 acres of agricultural real estate in Archuleta County, Colorado in 1959 to continue a large livestock ranch which was previously owned by my uncles. In 1970 I sold approximately 16,000

acres to Eaton International Corporation of Phoenix, Arizona which developed its acreage into the luxury subdivision now called Fairfield at Pagosa.

3. My plan during the 1980's was to continue to do business as a rancher but simultaneously develop the remaining land for recreational and residential use. As a result of these plans I became obligated to Defendant Farm Credit Bank's predecessors, farm cooperatives, in which I held shares.

4. By 1984 it became clear to me as well as the farm cooperatives, that the ranching operation in and of itself could not service the farm cooperative debt. Accordingly, with active participation by the farm cooperatives, we agreed to sell the property on an installment basis to a company called Doerring Associates Inc. At the direct suggestion of the farm cooperatives, I carried back the paper necessary to close the Doerring transaction.

5. After the sale, the Securities and Exchange Commission obtained an injunction which caused the Doerring group not to be able to meet its obligations to purchase the property. Accordingly, I again became the owner of all of the property described in Exhibit A to the Complaint.

6. As was well known to the farm cooperatives, I was still unable to meet the debt service on the property and accordingly a foreclosure proceeding was initiated by the farm cooperatives. After an unsuccessful attempt at Chapter 11 reorganization, the property was sold at a

Sheriff's sale on March 28, 1989. My redemption rights did not expire until September 28, 1989.

7. After the foreclosure sale of March 28, 1989, I had serious discussions with my son-in-law, Dr. Murray K. Jacobs of Modesto, California, who was very receptive to loaning money to me in the Spring of 1989, if necessary, to at a minimum reacquire the ranch headquarters property which is known in these proceedings as Parcel IV. Dr. Jacobs was also interested in financing other reacquisitions depending upon the dollar amount required.

8. It was my understanding during the Spring of 1989 that federal law required the Farm Credit Bank of Wichita to let me know if it was going to sell its interest in the foreclosed upon property so I could have the first opportunity to pay it back.

9. Had I been provided notice and an opportunity to purchase Parcel IV or Parcel IX either during the redemption period or after the redemption period, I would have made the necessary arrangements with my son-in-law to borrow the amount necessary to make the purchases.

FURTHER AFFIFIANT SAYETH NAUGHT.

/s/ Calvin J. Perkins
Calvin J. Perkins

Subscribed and sworn to before me this 27th day of February, 1990 by Calvin J. Perkins.

Witness my hand and official seal.

My commission expires: 12-02-93

/s/ Jane M. Worthington
JANE M. WORTHINGTON
Notary Public

P.O. Box 4429, Br. #1
Pagosa Springs, CO. 81157

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Case No. 89-C-2034

CALVIN J. PERKINS,

Plaintiff,

v.

FARM CREDIT BANK OF WICHITA, fka The Federal Land Bank of Wichita, a body corporate and federally chartered instrumentality of the United States organized pursuant to 12 U.S.C. Section 2011; and KATHERINE A. WUNDERLICH and RODNEY C. CLASS-ERICKSON and CHERYL L. CLASS-ERICKSON, assignees of the Farm Credit Bank of Wichita,

Defendants.

AFFIDAVIT OF DR. MURRAY K. JACOBS

STATE OF CALIFORNIA)
) ss.
COUNTY OF STANISLAUS)

I, Dr. Murray K. Jacobs of 1213 Coffee Road, Suite Q, Modesto, California 95355, being of lawful age do hereby attest as follows:

1. My name is Dr. Murray K. Jacobs and I am the son-in-law of Calvin J. Perkins who is the Plaintiff in the above captioned case.

2. In the Spring of 1989, after my father-in-law lost his land, he spoke to me about financing reacquisition of key parcels.

3. During the Spring of 1989 and thereafter to the present time, I have been in a financial position to assist my father-in-law in reacquiring certain parcels of the ranch land he previously owned.

4. Had my father-in-law been give notice and an opportunity to reacquire his headquarters property, including water rights, known as Parcel IV in this case, for $134,179.84, I would have been seriously interested in assisting him in the reacquisition.

5. I also would have been interested in assisting my father-in-law with regard to other parcels, depending on the amount required. For example, had there been notice and opportunity to reacquire Parcel IX for $28,415.81, I would have been seriously interested.

FURTHER AFFIFIANT SAYTH NAUGHT.

/s/ Murray K. Jacobs
Dr. Murray K. Jacobs

Subscribed and sworn to before me this 22 day of February, 1990, by Dr. Murray K. Jacobs.

Witness my hand and official seal.

My commission expires: February 24, 1993

SEAL

/s/ Joe F. M. Venture
Notary Public